

MALAYSIAN REPORTS

PUBLIC PROSECUTOR v.
DATUK TAN CHENG SWEE & ORS.

[F.C. (Suffian L.P., Raja Azlan Shah Ag. C.J. (Malaya),
Wan Suleiman, Chang Min Tat and Syed Othman F.JJ.)
September 15, 18-21 and October 21, 1978]

[Kuala Lumpur — Federal Court Criminal Appeal
No. 8 of 1978]

Criminal Law and Procedure — Public officer charged with corruption — Whether Commissioner of Malacca Municipality a public officer — Mens rea — Local Government Elections Act, 1960, ss. 4(6) and 5(3) — Municipal Ordinance (S.S. Cap. 133), ss. 144, 144A and 398(3) — Prevention of Corruption Act, 1961 (Act 57), s. 2 — Emergency (Essential Powers) Ordinance, 1970, s. 2.

Interpretation — Fair common sense meaning of language — Penal Statute.

The first respondent was charged as a public officer in his capacity as Commissioner of the Malacca Municipality with corrupt practices in the approval of plans. The second and third respondent were charged with abetment of the offences. The learned trial judge found that the first respondent in approving the plans in his capacity as Commissioner of Malacca Municipality had used his public office for his pecuniary or other advantage. But he held that the first respondent was not a public officer and in the absence of this first essential ingredient of the charge, he found that he had no case to answer and therefore acquitted him. He also acquitted the second and third respondents. The Public Prosecutor appealed.

Held: (1) the first respondent was a public officer within the definition of public officer in the Prevention of Corruption Act, 1961 and for the purposes of a charge of corrupt practice under the Emergency (Essential Powers) Ordinance, 1970;

(2) in this case a *prima facie* case had been established against the first and second respondents and the case should therefore be remitted to the High Court with a direction that the defence be called;

(3) the prosecution had not adduced evidence beyond reasonable doubt of the third respondent's knowledge of the connection of the first respondent with the housing developer in this case and therefore his acquittal must be upheld.

Cases referred to:-

- (1) *Public Prosecutor v. Phee Joo Teik* [1962] M.L.J. 56.
- (2) *Henley v. Mayor and Burgesses of Lyme* (1830) 103 E.R. 995.
- (3) *The King v. Whitaker* [1914] 3 K.B. 1283.
- (4) *National Coal Board v. Gamble* [1958] 3 W.L.R. 434.
- (5) *Gough v. Gough* [1891] 2 Q.B. 665, 674.
- (6) *Bristol Trams Co. v. Bristol* 59 L.J.Q.B. 449.
- (7) *Dyke v. Elloit, the Gauntlet* (1872-4) A.C. 184.
- (8) *M. Narayanan Nambiar v. State of Kerala* A.I.R. 1963 S.C. 1116.
- (9) *R. v. Samuel Vaughan* 98 E.R. 308.

HIGH COURT.

Tan Sri Datuk Haji Mohamed Salleh bin Abas, Solicitor-General (*T.S. Sambanthamurthi* and *Abbas Ismail Rowland* with him) for the prosecution.

M. Shankar for the 1st accused.

Sulaiman C. Navarednam for the 2nd accused.

Dato Wong Seng Chow for the 3rd accused.

Edgar Joseph Jr. for the 4th accused.

Cur. Adv. Vult.

- A** Ajaib Singh J. (ruling on defence submission of no case to answer): The 1st accused in this case is charged with three counts under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970. The 2nd accused is charged with abetting the 1st accused on the 1st and 2nd charges under section 109 of the Penal Code while the 3rd and 4th accused are charged with abetting the 1st accused on all the three charges.

- B** The facts of the prosecution case are not much in dispute. On September 21, 1966 by M.P.U. 26 and 27 of 1966 the State Government of Malacca suspended the Constitution of the Malacca Municipality and transferred all the functions of the Malacca Municipal Council, including the President, Deputy President and the Municipal Councillors to the Chief Minister. On December 24, 1966 by M.P.U. 48 of 1966 the Chief Minister appointed an Advisory Committee for the Municipal Council with effect from December 1, 1966. Four persons were appointed to this Committee — Datuk Tan Cheng Swee (1st accused), Ng Chong Chee (2nd accused), N.V. Patil and Tuan Haji Ahmad bin Lapis. Subsequently by M.P.U. 30 and 31 of 1967 dated October 31, 1967 the earlier M.P.U. 26 and 27 of 1966 were cancelled and the State Government transferred all the functions of the Municipal Council, including the President, Deputy President and the Municipal Councillors to the 1st accused who was to be styled as the Commissioner of the Malacca Municipality with effect from November 1, 1967. The Constitution of the Malacca Municipality remained suspended.

- E** Thereafter by M.P.U. 10 dated May 13, 1971 to take effect from February 1, 1971 it was provided that for the purpose of discharging his functions Datuk Tan Cheng Swee shall be assisted by a Committee consisting of three members to be appointed by the State Authority with Datuk Tan Cheng Swee as the Chairman and the Municipal Secretary as the Secretary of this Committee. Provision was also made for the payment of a monthly allowance of \$500 to the Chairman and \$200 to the other members to be paid out of the Malacca Municipal fund. The Committee was also empowered to appoint any number of sub-committees the members of which to be selected only from amongst the members of the Committee. The earlier M.P.U. 48 of December 24, 1966 was cancelled.

- G** In the same government gazette dated May 13, 1971 by M.P.U. 11 the State Authority appointed Encik Ng Chong Chee, Encik N.V. Patil and Tuan Haji Rahmat Shah bin Ali Shah Khan as members of the Committee to assist Datuk Tan Cheng Swee in exercise of his functions as the Commissioner of the Malacca Municipal Council with effect from February 1, 1971. This M.P.U. 11 of 1971 was cancelled by M.P.U. 5 of 1975 when an enlarged Committee was constituted to assist Datuk Tan Cheng Swee. The members of this Committee were the State Legal Adviser, the State Financial Officer, the District Officer, Malacca Tengah, Tuan Haji Rahmat Shah bin Ali Shah Khan, Encik Ismail bin Hashim, Encik Ng Chong Chee, Encik N.V. Patil and Encik Gan Boon Leong.

One of the several sub-committees which were in due course constituted was the Building Sub-Committee consisting at the time of its formation Encik N.V.

Patil, Encik Ng Chong Chee and Tuan Haji Rahmat Shah bin Ali Shah Khan. Some time later the District Officer, Malacca Tengah, was appointed as a member of this Building Sub-Committee. The function of this sub-committee was to recommend approvals or rejections of building plans on the advice given by the technical staff of the Engineering Department of the Municipality particularly the Municipal Engineer who is the 4th accused in this case and who together with the Municipal Secretary, the Building Inspector and the State Town Planner sat on this sub-committee as ex-officio members.

The 3rd accused is a business man and director of several companies. The Apex Realty Sdn. Bhd. and Atlas Building Company Sdn. Berhad were incorporated on December 3, 1969 and on July 19, 1972 respectively of which the 3rd accused is the Managing Director. He also became the Managing Director of Almac Sdn. Berhad which was incorporated on June 8, 1973. Apex and Atlas were the owners of Lots 183, 187 and 188 in Town Area 37 Ujong Pasir. With the object of developing and starting a housing estate the 3rd accused contacted the 1st accused to form Almac Sdn. Berhad for the purpose of developing Apex and Atlas lands as well as the adjoining 7 lots which were being offered by their owners for sale. The subscribers of Almac were the 1st and the 3rd accused each holding 1,000 shares of \$1 each. On June 23, 1973 at the first directors' meeting of Almac the 1st accused was appointed executive chairman of Almac Sdn. Berhad and the 3rd accused the Managing Director. The Apex and Atlas lands as well as the adjoining lots were in due course acquired by Almac and plans to develop the land into a housing scheme commenced.

On May 14, 1973 the Malacca Land & Engineering Surveys applied for the approval of the lay-out plan in respect of Lots 181-183, 187-188, 544-548 Town Area 37 on behalf of Apex who were the owners of the land at that time. The plan was referred to the Town Planner by the 4th accused and eventually a fresh lay-out plan was submitted on the suggestion of the Town Planner. After this second plan was processed the Building Sub-Committee recommended its approval on March 27, 1974 on the advice of the 4th accused and the 1st accused signed his approval on March 29, 1974. The letter of approval dated April 1, 1974 was signed by the 4th accused and sent out to the Malacca Land & Engineering Surveys. Two conditions were set out in this letter of approval namely —

- (a) Proper building plans should be submitted for the consideration of the Council prior to commencement of building operations.
- (b) Building plans will only be considered after the sub-division plans are approved by the State Authority.

The lay-out plan was the subject-matter of the 1st charge.

With regard to the 2nd charge the building plans for Almac land were submitted to the Municipal Engineer on April 25, 1974 by Richard Liong & Associates a firm of chartered architects. After these plans had been processed the Building Sub-Committee on the advice of the Municipal Engineer recommended ap-

- A approval on July 14, 1975 and the plans were approved by the 1st accused on the same day. The letter of approval dated July 16, 1975 signed by the 4th accused was sent out to Richard Liong & Associates. There were 4 conditions in this approval letter as follows: —
 - (a) The 40 ft. Cul-de-Sac should be metalled to the full width.
 - B (b) Temporary sidelanes should be provided for those backlanes which abut the land reserved for future development.
 - (c) The open space shall be properly levelled, turfed and trees planted around the edges. Children playground equipment such as swings, slides, seesaw and "monkey climb" should be provided.
 - C (d) Damage of usage of the existing metalled road on Lot 178 should be made good before Occupation Certificate can be issued.

At the date of approval of the building plan in relation to the second charge condition (b) in the earlier approval letter dated April 1, 1974 had not been fulfilled. The sub-division plan had not yet been approved by the State Authority.

- D With reference to the third charge the building plans for 2 storey shop-houses were submitted by Richard Liong & Associates on behalf of Almac on July 17, 1975 and again after the usual process by various officers of the Municipality the Building Sub-Committee acting on the advice of the Municipal Engineer recommended approval on November 15, 1975 and this was approved by the 1st accused on November 17, 1975. The letter of approval was signed by the 4th accused on November 21, 1975 with the following two conditions: —
 - E (1) Test pile results, calculations and R.C. Details to be submitted prior to commencement of works.
 - F (2) The back lane should be made up with 3" grouting.

The sub-division plans were still not yet approved by the State Authority.

- G There were also two related matters where acting on the advice of the 4th accused the Building Sub-Committee had recommended approval for the amalgamation of Almac land and for the approval of the plans for sub-division. No charges however were preferred against any of the accused in respect of these two matters.

- H An application having been received by the Collector of Land Revenue from Almac for the amalgamation of Almac land the Collector of Land Revenue wrote to the Municipal Secretary on March 14, 1975 enclosing two copies of Form 9A under the National Land Code and six copies of the plans. In his letter the Collector of Land Revenue asked for the comments of the Municipal Secretary and requested that if there was no objection the Forms 9A should be filled up and returned to him. After this had been looked into by the officers of the Municipality the Building Sub-Committee met on March 31, 1975 and on the advice of the 4th accused recommended approval of the amalgamation to the 1st accused who signed his approval on the same day. Thereafter on April 4, 1975 the Municipality Secretary replied to the Collector of Land Revenue that the Municipality had no

objection to the amalgamation and returned 2 copies of Form 9A duly completed and 5 copies of the plans. The 2 copies of Form 9A were signed by the Municipal Engineer. The amalgamation was finally approved by the State Commissioner of Lands and Mines on April 4, 1975.

On April 29, 1975 the Collector of Land Revenue again wrote to the Municipal Secretary that Almac was now making an application for sub-division of the land which was now amalgamated and given Lot No. 1803. The Collector enclosed 2 copies of Form 9A and 6 copies of the plans and asked the Municipality to fill up Form 9A if it had no objection to the sub-division. The Building Sub-Committee met on May 15, 1975 and as advised by the 4th accused the Committee recommended approval of the sub-division plans. The 1st accused signified his approval on the same day and the Municipal Secretary wrote back to the Collector of Land Revenue on May 15, 1975 returning 2 copies of Forms 9A and 5 copies of the plans. Meanwhile Almac's application for sub-division was being considered by the Partition and Sub-Division Committee of the State Government. On May 27, 1975 Almac's application as well as 11 other similar applications for sub-division of land were postponed for further clarification from the J.K.R. and finally on October 26, 1977 Almac's application for sub-division was approved. A decision on Almac's application could not be made earlier because while some clarification was being sought from the J.K.R. the file relating to Almac's application was taken away by the B.S.N. in the course of their investigations.

Yet another related matter was that which concerned the approval of roads and drainage plans for the houses on Almac's land. On June 25, 1975 Richard Liong & Associates submitted three sets of roads and drainage plans to the 4th accused for approval and after these had been processed and commented upon by the officers of the Building Section of the Municipality the 4th accused approved the roads and drainage plans on August 8, 1975 and sent out a letter of approval on August 21, 1975.

Meanwhile Almac negotiated with Goh Tiong Sin Construction Sdn. Berhad and entered into a joint venture agreement dated April 25, 1975 to develop Almac's land with a housing estate. Almac had to bring in a partner because of financial difficulties. Things started to move a little faster after this. The earth filling work commenced in early March 1975 and bookings for the houses opened to the public in May 1975. 195 units were to be built but only 141 were completed for which a certificate of fitness to occupy the units was issued by the Acting Municipal Engineer on August 23, 1977 and finally the sub-division of Lot 1803 was approved by the State Authority on October 26, 1977.

(His Lordship then summarised the evidence of the prosecution witnesses and continued)

After having gone through the evidence adduced by the prosecution including the large number of documentary exhibits and after giving due consideration to the submissions advanced on behalf of the prosecution and the defence and the cases cited I have come

A to the conclusion that none of the accused has a case to answer. In my judgment the prosecution has failed to make out its case on any of the charges preferred against the accused.

B The 1st accused is charged with three counts of corrupt practice under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 that while being a public officer he committed a corrupt practice on each of the three dates specified in the charges. In order to establish a case against him the prosecution has to prove two ingredients namely that he was a public officer and that while being such officer he committed a corrupt practice. Section 2(2) of the Ordinance states that for the purpose of the section the term public officer has the meaning assigned to it in section 2 of the Prevention of Corruption Act, 1961 and section 2 of this Act states that a public officer includes any person in the permanent or temporary employment of a public body. The term public body is itself defined in the Prevention of Corruption Act, 1961 *inter alia* as—

D “any corporation, council, board, commissioners or other body which has power to act under and for the purpose of any written law in force in Malaysia or any part thereof relating to local government, public health or undertakings of public utility, or otherwise has power to administer funds belonging to any Government in Malaysia, or money raised by rates, taxes or charges in pursuance of any written law in force in Malaysia or any part thereof.”

E The Municipal Council of Malacca is clearly a public body within the meaning of that term in the Prevention of Corruption Act, 1961 but the important question which was raised by the defence is whether or not the 1st accused was a public officer during the material time within the meaning of section 2 of the Prevention of Corruption Act, 1961. In a general sense of course the 1st accused would appear to be a public officer as he was apparently performing the functions of a public office as the Commissioner of the Malacca Municipality. But whatever is apparent may not always be real in a legal sense. The 1st accused may well be a public officer under the common law and he certainly is a public servant within the tenth description of a public servant under section 21 of the Penal Code which is as follows:—

G “Every officer whose duty it is, as such officer, to take, receive, keep, or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town, or district, or to make, authenticate, or keep any document for the ascertaining of the rights of the people of any village, town, or district.”

H In the present case however it is incumbent upon the prosecution to prove that the 1st accused was a public officer within the definition of that term in section 2 of the Prevention of Corruption Act, 1961 and not within any other law or enactment.

I For the purpose of the Emergency (Essential Powers) Ordinance No. 22 of 1970 the prosecution has to restrict itself in proving that the 1st accused was a public officer within the meaning assigned to it in section 2 of the Prevention of Corruption Act, 1961. By assigning a specific meaning to the term public officer the inference is that the legislature intended that the term should mean only that as defined in

section 2 of the Prevention of Corruption Act, 1961 and nothing else. The prosecution has therefore to prove that the 1st accused was in the permanent or temporary employment of the Malacca Municipality at the relevant dates specified in the three charges. There is however no evidence at all that the 1st accused was in the employment of the Municipality and by no stretch of the imagination can it be said that his position as the Commissioner made him a person in the permanent or temporary employment of the Malacca Municipal Council. The fact that he was paid an allowance made no difference as he was not engaged as an employee of the Municipal Council. By M.P.U. 30 and 31 which came into force with effect from November 1, 1967 all the duties and functions of the Malacca Municipal Council including the President, Deputy President and Councillors or any or all of them were transferred to the 1st accused and he was styled as Commissioner. In short he was himself the Council and not its employee.

In support of his submission that the 1st accused was a public officer the learned Solicitor-General referred to the case of *Public Prosecutor v. Phee Joo Teik*⁽¹⁾ where a Town Councillor of the Butterworth Town Council was held to be a public servant within the meaning of section 21 of the Penal Code. However this case cannot assist the prosecution in the present case before me. In *Phee Joo Teik's* case the accused was charged under sections 161 and 165 of the Penal Code which relate to the acceptance of bribes or other valuable consideration by public servants. The accused was a Town Councillor and did not come within the meaning of public servant under section 21 of the Penal Code. But under section 398 of the Municipal Ordinance Councillors are deemed to be public servants within the meaning of the Penal Code and it was accordingly held that the accused being a Town Councillor he was a public servant within the meaning of the Penal Code.

In the present case there is nothing in the Emergency (Essential Powers) Ordinance No. 22 of 1970 to indicate that an officer defined as a public servant in the Penal Code or as a public officer under the common law or elsewhere in some other legislation shall be deemed to be a public officer within the meaning of the Emergency (Essential Powers) Ordinance No. 22 of 1970. As I have said earlier section 2 of this Ordinance states that a public officer shall have the meaning assigned to it in section 2 of the Prevention of Corruption Act, 1961 and section 2 of this Act states that a public officer includes any person in the permanent or temporary employment of a public body so that the position of the 1st accused has to be considered in the light of this definition and this definition alone.

I did not find it altogether easy to follow the 1828 case of *Henly*⁽²⁾ which was cited by the learned Solicitor-General in support of his contention that the 1st accused was a public officer. As far as I could gather from this case the decision turned upon the interpretation of certain letters patent granted by Charles I to the Mayor and Burgesses of Lyme and it was held — so it appears to me from the report — that the Mayor of Lyme was on the facts of the case a public officer. I do not think however that the case of *Henly*

A is relevant to the present case before me. The 1st accused here is not charged for having done something in his capacity as a public officer under the common law but is charged under a statute where the term public officer is assigned with a specific meaning.

B The other case of *The King v. Whitaker*⁽³⁾ cited by the prosecution was also not helpful. Here too the term public officer was discussed under the common law and not under any statutory definition of that term.

C In the circumstances therefore I hold that the prosecution has failed to prove the first vital ingredient that the 1st accused was a public officer at the material time within the meaning of section 2 of the Prevention of Corruption Act, 1961.

D If the prosecution had succeeded in proving that the 1st accused was a public officer the second ingredient which it has to prove is that the 1st accused committed an act of corrupt practice on each of the three dates mentioned in the three charges. Here too the Ordinance has defined corrupt practice in relation to a public officer as any act done by him in his capacity as a public officer whereby he has used his public office for his pecuniary or other advantage. Counsel for the defence submitted that in order to establish the ingredient of corrupt practice the 1st accused must be shown to have committed the act with an evil mind or evil intention or that he abused his position as the Commissioner of the Malacca Municipal Council for his own advantage. With respect I disagree with this submission. Here too on general principles of interpretation of statutes the legislature having defined the term corrupt practice the inference is that the definition is not to be considered wider or narrower than it is stated in clear terms in the Ordinance itself. E *Mens rea* or guilty mind is an essential ingredient in every crime except in cases of strict or absolute liability but *mens rea* which is required to be proved in the present case is not as suggested by the defence. All that the prosecution need prove to establish the second ingredient is the knowledge on the part of the 1st accused that he was doing an act in his capacity as a public officer whereby he used his public office for his pecuniary or other advantage. F

G The 1st accused is a substantial shareholder and also a director and the Executive Chairman of Almac Sdn. Berhad which was formed for the specific purpose of launching a housing project. Before the formation of Almac he had discussed this project with the 3rd accused and a business man Lim Kim Soo and he had also studied the feasibility report which showed the project as a profitable venture. In his capacity as the Commissioner of the Malacca Municipal Council he had approved the plans of Almac and these acts of approval would, in my view, assuming that I had held him to be a public officer, amount to corrupt practice within the meaning of the term in the Emergency (Essential Powers) Ordinance No. 22 of 1970. H The acts of approval of the plans by Almac by the 1st accused constituted acts for his pecuniary advantage. Whether Almac would eventually have made a profit or a loss is immaterial for it is at the relevant dates when the 1st accused approved the plans I

that the prosecution has to prove that it was for the 1st accused's pecuniary or other advantage. This was sufficiently proved by the prosecution that the venture was a profitable one and these approvals of Almac's plans were to the advantage of the 1st accused as the holder of a large number of shares in Almac.

In his statement to the police the 1st accused denied knowledge. He said he did not know that he was approving the plans of Almac when he signed the approvals in the relevant files as many files would come to him and he would just signify his approval and sign his minute after seeing the recommendations of the Building Sub-Committee. I cannot accept this explanation. The 1st accused is after all no ordinary person. He has been an active politician since 1955 when he was elected to the State Legislative Assembly. He was appointed to the State Ex. Co. in 1957 and he has held responsible positions in the M.C.A. and in the National Front. When he was appointed Commissioner of the Malacca Municipality he was entrusted with all the duties and functions of the President, Deputy President and Councillors and it cannot be accepted that he would have paid inadequate attention to the files which he was dealing with when signifying his approvals in the minute sheets. The names of the owners of the land are clearly typed or written on the front cover of the files. It is hardly likely that the 1st accused did not know the names of the owners as and when he signed his approvals. Also he was very much aware of what was happening in Almac as evidenced by the discussions at Almac's meetings relating to plans and finances of the housing project and the fact that the plans had been submitted by Almac to the Municipality for approval. I am satisfied that the prosecution has adduced sufficient evidence to establish this second ingredient.

In this connection the learned Solicitor-General referred to section 43 of the Municipal Ordinance and submitted that this section prevents any Councillor from acting in a manner which would bring his public duties into conflict with his private interest and therefore such conduct is made punishable as a corrupt practice under section 2 of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

I agree with the first part of this submission but as to the second part I do not think it to be a correct statement of the law that a breach of section 43 is punishable as a corrupt practice under section 2 of the Emergency (Essential Powers) Ordinance No. 22 of 1970. There is absolutely no link between section 43 of the Municipal Ordinance and the Emergency (Essential Powers) Ordinance No. 22 of 1970. Nor is a breach of section 43 punishable by any other provision in the Municipal Ordinance itself. If at all a breach of this section 43 may be punishable under section 225B of the Penal Code which provides for the punishment of offences against any law where no special punishment is provided. Section 225B of the Penal Code reads as follows:—

"225B. Whoever does anything which by any law in force in Malaysia he is prohibited from doing, or omits to do anything which he is so enjoined to do, shall, when no special punishment is provided by the law for such commission or omission, be punishable by fine not exceeding one hundred dollars."

A As far as the 1st accused is concerned it is difficult to appreciate how he can be said to have contravened section 43 of the Municipal Ordinance. The prohibition under section 43 is against voting or being present at the discussion of any matter before the Councillors or a Committee. There is no evidence at all that the 1st accused had voted or had been present at any such discussion. In exercising his functions as the Commissioner the 1st accused acted alone in approving the plans recommended by the Building Sub-Committee and it cannot be said that in approving those plans he had contravened section 43 by either voting or being present at any discussion. Consequently section 43 of the Municipal Ordinance is not applicable to the 1st accused.

C I think I might as well say it here that I do not also agree with Mr. Shankar's interpretation of section 43 of the Municipal Ordinance. The words in section 43(2) are quite clear. A Councillor who is interested merely by reason of being a shareholder is protected and not a director, chairman or managing director of a joint stock company. The protection under section 8(5) however extends not only to a shareholder but also to a director but not to a chairman or managing director. The words in brackets in section 8(5) are to be read in relation to the word director immediately preceding the words in brackets and not in relation to the word shareholder in the sub-section. So I do not think there is substance in Mr. Shankar's contention that directors and chairmen are protected under section 43(2) because they are not specifically excluded.

Although as I have said earlier that it is not part of the prosecution case on the second ingredient to prove that the 1st accused acted with an evil mind or evil intention when he approved the applications of Almac yet these factors may well be taken into consideration on the question of any sentence that may be passed on the 1st accused assuming that all the other ingredients are proved against him. So if there was evidence of any evil intention on the part of the 1st accused or that he abused his position to show undue favour to Almac then the punishment would be more severe than it would otherwise be if there was no such intention or abuse. In this connection I must say that there is absolutely no evidence that the 1st accused acted with an evil mind or evil intention or that he abused his position to show special favour to the applications of Almac. There is no evidence to show that he interfered directly or indirectly when the plans were being processed by the Engineering Department, the Health Department, the State Town Planner's Department, the Land Office and the Office of the Commissioner for Lands and Mines. Therefore if the prosecution had proved its case against the 1st accused any sentence on him would have had to be considered in the light of all these factors which would have greatly mitigated his offence. The only sin the 1st accused would have committed is that while being the Commissioner he was also a shareholder and Executive Chairman of Almac whose applications for the lay-out and building plans he had approved.

On the abetment charges against the 2nd, 3rd and 4th accused the evidence adduced by the prosecution fell far short of establishing a case against any one

of them. Under section 107 of the Penal Code a person abets the doing of a thing who —

“First — Instigates any person to do that thing; or

Secondly — Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly — Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1 — A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

ILLUSTRATION

A, a public officer, is authorised by a warrant from a court to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B. abets by instigation the apprehension of C.

Explanation 2 — Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.”

Abetment by instigation means that the abettor actively suggests or stimulates the commission of the principal offence. An advice can amount to instigation if it is intended to actively suggest or stimulate the principal offence. The abettor also must necessarily know all the facts which constitute the principal offence.

Instigation by wilful misrepresentation is well illustrated under Explanation 1 of section 107. Instigation by wilful concealment of a material fact occurs only where there is some duty imposed by law which a person is obliged to disclose. It must involve a breach of duty imposed by law and not merely a breach of a departmental rule of conduct or discipline. Under the second class of abetment by conspiracy there must be evidence of some agreement to do some illegal act or effect a legal transaction by illegal means. Under the third class of abetment by intentional aid there must be evidence to show that by some act done by the abettor he had intended to aid or facilitate the commission of the principal offence. (See generally the commentary on sections 107 to 109 in *Ratanlal on Crimes* — 22nd Edition).

It is in the light of these principles that the prosecution evidence has to be considered against the 2nd, 3rd and 4th accused. The 2nd accused was a member of the Building Sub-Committee as well as a shareholder of Almac at the relevant dates mentioned in the two charges preferred against him. There is no evidence whatsoever that he had instigated or conspired or intentionally aided the commission of any offence by the 1st accused nor is there any evidence to show that the 2nd accused knew about the criminality of any act on the part of the 1st accused. As a member of the Building Sub-Committee he had together with the other members of the Committee accepted the advice of the technical staff of the Municipality including that of the 4th accused. This cannot amount to abetment of the principal offence by the 1st accused. In his statement to the police the 2nd accused said that when he recommended the approval of the building plans on July 14, 1975 he was not aware of any conditions that had been laid down in the earlier

approval of the lay-out plans on March 29, 1974. He said that he would have asked for clarification if he had been aware of the conditions. He also said that he did not declare his interest in Almac because he was only a shareholder and he did not think it necessary for him to declare his interest. Section 43 of the Municipal Ordinance was inapplicable to the 2nd accused because in the first place he was just a member of a Sub-Committee of the Municipal Council and not a Councillor as stated in that section. Secondly if he had been a Councillor he would have been protected under sub-section (2) of section 43 of the Municipal Ordinance because he was a mere shareholder in a joint stock company namely Almac. The 2nd accused was also under no legal obligation to disclose to the Building Sub-Committee the 1st accused's interest in Almac.

Similarly with regard to the 3rd accused there was hardly any evidence to establish that he had abetted the 1st accused by instigation, conspiracy or intentional aid. Almac's plans were submitted by professionals and were subjected to scrutiny by various departments of the Municipality without any interference by the 3rd accused and only after the plans had been processed according to the rules and regulations of the Municipality that they were submitted to the Building Sub-Committee for its recommendations to the 1st accused for approval. The 3rd accused was in no way concerned with the discussions or business of the Building Sub-Committee.

It was suggested by the Solicitor-General that the 3rd accused was guilty of abetting by intentionally aiding the 1st accused because the 3rd accused knew that the 1st accused would be in a position whereby his public duties would conflict with his private interests and the 3rd accused had done nothing to counteract this. With respect I cannot see how this contention can be sustained to the extent of making the 3rd accused liable as an abettor. The fact that the 3rd accused had approached the 1st accused for the formation of Almac and the positions they both held in Almac as Managing Director and Executive Chairman respectively cannot in the absence of any evidence or reasonable inference amount to abetment by instigation or by conspiracy or by aiding.

The formation of Almac was perfectly legitimate and as Dato' Wong Seng Chow submitted there was nothing sinister about it, everything was done openly and the shares were registered openly in the relevant books. Indeed as Dato' Wong Seng Chow submitted if it was the intention of the 3rd accused to bring the 1st accused into the company with the motive of getting him to abuse his authority as Commissioner it would have been the height of folly to openly show the 1st accused as a shareholder as well as the Executive Chairman of Almac and it would have been much easier and safer in order to avoid any suspicion to arrange for the 1st accused's participation under the name of a nominee.

In the case of the 4th accused too there is no evidence that he had in any way instigated or conspired or intentionally aided the commission of any offence by the 1st accused. In his capacity as the Municipal Engineer it was the duty of the 4th accused

to see that applications for approval of all lay-out plans, building plans and road and drainage plans received from developers were processed and approved as expeditiously as possible. There was no conclusive evidence that when the 4th accused recommended approval of Almac's plans he knew that the 1st accused had an interest in Almac. Even if he was aware of this fact it cannot be held that by this reason alone the action taken by the 4th accused in processing and recommending Almac's plans was in any way criminal. It can be clearly seen from the relevant files that the 4th accused had consulted the technical advisers such as the Assistant Building Inspector, the Building Inspector, the Town Planner and the Municipal Health Officer at various stages of processing the various applications of Almac. So too with Almac's applications for amalgamation and sub-division. He obtained the views of his officers and in effect accepted their views when he replied to the Collector of Land Revenue that the Municipality had no objection to amalgamation and sub-division.

As to the 1st charge it is clear from the relevant file that the 4th accused had referred the lay-out plan to the State Town Planner who in turn had put up his own plan for compliance by the Malacca Land & Engineering Survey. Eventually a fresh plan which was based on the recommendation of the Town Planner was recommended for approval by the Building Sub-Committee. I do not see how it can be said that by his action relating to the lay-out plan the 4th accused had abetted the 1st accused in the commission of any offence. By advising the Building Sub-Committee to recommend approval of the plan by the 1st accused he was doing no more than his duty as the Municipal Engineer.

As to the second charge when he advised recommendation of approval of the building plans the 4th accused was aware that sub-division had not been approved by the State Authority. In his cautioned statement he gave his reasons for advising recommendation for meanwhile the policy of 30% reservation for bumiputras was being mooted by the State Government. In his requisition notice dated May 6, 1975 relating to the second charge he had stated in item 23 that "A 30% reservation of the housing scheme has to be provided for bumiputras or the sub-division has to be approved by the State Authority prior to the building plans being considered". To this the architects Richard Liong & Associates replied on May 24, 1975 that both conditions in item 23 had been complied with. However the evidence in this case was that in actual fact sub-division had not been approved by the State Authority but the developers had agreed to a 30% reservation of the housing scheme for bumiputras. The 4th accused's reasons for advising recommendation may not be sound but surely this cannot amount to abetment in the absence of evidence that the 4th accused instigated, conspired or intentionally aided the commission of any offence by the 1st accused. Infringement of departmental regulations or of standard procedure will not make the 4th accused an abettor. Much more in the nature of concrete legal proof is required before a person may be convicted of any criminal offence.

A Mr. Edgar Joseph had submitted that the two conditions in the letter of approval dated April 1, 1974 relating to the lay-out plans were null and void as there was nothing in the Municipal Ordinance or in the By-laws and regulations empowering the Municipality to impose any conditions on the approval of building plans. This certainly is not a valid contention because as was pointed out by the learned Solicitor-General the power to impose conditions by the Municipality is implied by virtue of section 40(2)(b) of the Interpretation Act, 1967.

B As to the third charge the relevant Municipal file shows that the application relating to the building plans had been processed and commented upon by the various officers in the Building Section of the Municipality after which the application for waiver by Almac which was made through the architects Richard Liong & Associates was put before the Building Sub-Committee for discussion. There is evidence that some discussion did take place on this application which was finally recommended for approval by the Building Sub-Committee on the advice of the 4th accused. Here again there is nothing to show that the 4th accused ignored or bent any provision of the Municipal Ordinance or of the Building By-laws in advising recommendation for the waiver and for the building plans to be approved.

C Almac's plans took months for approval while being processed by the Municipality. There need not have been any delay if the 4th accused had intended to show special favour to Almac's applications for the approval of the lay-out and building plans. On matters relating to the *cul-de-sac*, open green and open area calculation the prosecution submitted that the 4th accused had shown special favour to Almac. Here again I would say that the evidence does not support this contention. The relevant files and the minutes therein clearly show that these matters were commented upon by various officers in the Engineering Department and the views were also obtained from the Municipal Health Officer before the 4th accused made his decisions. As for the roads and drainage plans these were approved by the 4th accused precisely because it was his duty to do so following the established practice in the Municipality and there was therefore no need for him to refer these plans to the Building Sub-Committee. However even in approving the roads and drainage plans the 4th accused had obtained the views and comments of the technical staff of the Engineering Department.

D The learned Solicitor-General submitted that in the two unrelated files, Exhibits P68 and P69 the 4th accused had insisted in the first case that the building plans would not be approved before sub-division and in the second case he insisted that the developers should pay for half the cost of the back-lane. But in the case of Almac the 4th accused did not insist on the sub-division condition and he also recommend waiver of the back-lane requirement.

E I think there must be hundreds of such files in the Municipality and picking out one or two files to prove a point cannot be considered sufficient to establish that the 4th accused unduly favoured Almac. Moreover as pointed out by Mr. Edgar Joseph the

4th accused was relying on his technical staff in these cases (Exhibits P68 and P69). In the first case only 3 units of shop-houses were involved and in the second case the Municipality constructed the back-lane because the developers had no land for this purpose. Also it was well within the powers of the Municipality to grant waiver at the request of the architects Richard Liong & Associates.

The learned Solicitor-General relied very strongly on the case of the *National Coal Board v. Gamble*⁽⁴⁾ in his submission that the 2nd, 3rd and 4th accused were guilty of the abetment charges which were preferred against them. The facts in that case however are quite different and the principle enunciated in that case also does not fit in with the facts in the present case before me. In *Gamble's* case the weighbridge operator who was an employee of the National Coal Board knew that the load on the lorry was 4 tons overweight and he told the lorry driver about it. The lorry driver said he would take the risk and having taken the weighbridge ticket from the weighbridge operator he drove the lorry out of the colliery premises. On these facts it was held that there was proof of a positive act of assistance voluntarily done by the weighbridge operator and with full knowledge of the circumstances constituting the offence and therefore the crime of aiding and abetting was committed. Lord Goddard C.J. in his judgment said —

"In *Ackroyds Air Travel, Ltd. v. Director of Public Prosecutions*, I stated the law with regard to aiding and abetting in this way:

'...a person could only be convicted...as an aider and abettor if he knew all the circumstances which constituted the offence. Whether he realized that those circumstances constituted an offence was immaterial. If he knew all the circumstances and those circumstances constituted the offence...that was enough to convict him of being an aider and abettor'. Humphreys J. in the same case said: '...it must be shown that the unlawful act has been committed, and, therefore that the offence has been committed, and, further, that the person charged as an aider and abettor was aware of the facts sufficiently to enable him to know that the act was unlawful'."

Devlin J. said —

"A person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it; and if he does so knowingly and with intent to aid, he abets it as well and is therefore guilty of aiding and abetting. I use the word 'supplies' to comprehend giving, lending, selling or any other transfer of the right of property. In a sense a man who gives up to a criminal a weapon which the latter has a right to demand from him aids in the commission of the crime as much as if he sold or lent the article. But this has never been held to be aiding in Law: see *Rex v. Lomas* — 9 Cr. App. R 220 — and *Reg. v. Bullock* — [1955] 1 W.L.R. 1 — The reason, I think, is that in the former case there is in law a positive act and in the latter only a negative one. In the transfer of property there must be either a physical delivery or a positive act of assent to a taking. But a man who hands over to another his own property on demand, although he may physically be performing a positive act, in law is only refraining from detinue. Thus in law the former act is one of assistance voluntarily given and the latter is only a failure to prevent the commission of the crime by means of a forcible detention, which would not even be justified except in the case of felony. Another way of putting the point is to say that aiding and abetting is a crime that requires proof of *mens rea*, that is to say, of intention to aid as well as of knowledge of the circumstances, and that proof of that intent involves proof of a positive act of assistance voluntarily done."

Briefly to constitute the offence of aiding and abetting the prosecution must prove intention on the part of the abettor to aid and he must be shown to have known the circumstances constituting the crime

A at the time when he voluntarily does a positive act of assistance.

In the present case before me the prosecution has not adduced sufficient evidence against the 2nd, 3rd and 4th accused to establish *mens rea* or the intent to aid the commission of the principal offence. Nor has it been proved that any one of these three accused knew all the circumstances of the commission of the principal offence as was the case in *Gamble*. The prosecution evidence against all the 4 accused persons is based largely on suspicion and insinuation and there is no concrete evidence to establish a case against any one of them. If the 1st accused had been proved to be a public officer his offence would have been of a highly technical nature because of the utter lack of any evidence of abuse of power or any corrupt intent or motive not worthy of a lengthy investigation and prosecution. Even if the 1st accused had not been the Commissioner himself Almac's applications would have in the normal course been approved by who ever occupied the chair of Commissioner. As for the remaining three accused there is absolutely no connection direct or indirect between any one of them and the 1st accused of instigation, conspiracy or intentionally aiding within the meaning of abetment in the Penal Code.

I have no reason to say that the investigations by the B.S.N. and the subsequent prosecution of this case in court were not done in good faith. But I must say that the prosecution case rested on very soft ground. The prosecution was picking up bits and pieces to establish its case but those bits and pieces came no where near satisfactory legal proof which is required in any criminal trial. It surely was a monumental task for the prosecution in trying to make mountains out of mole-hills.

To sum up I hold that the 1st accused was not a public officer as defined in section 2 of the Prevention of Corruption Act, 1961 and secondly even if he was a public officer his offence was merely technical. Whatever the position of the 1st accused may be none of the remaining three accused can be held guilty of abetment. There is no evidence whatsoever to connect any one of them with the 1st accused in the sense that any one of them had instigated or conspired or intentionally aided in the commission of any offence by the 1st accused.

My ruling on the defence submission of no case to answer therefore is that the prosecution has failed to make out a *prima facie* case on any of the charges preferred against the accused. All the four accused are accordingly acquitted and discharged.

From the above decision the prosecution appealed.
FEDERAL COURT.

Tan Sri Datuk Haji Mohamed Salleh bin Abas, Solicitor-General, Malaysia (Mohamed Noor bin Haji Ahmad and T.S. Sambanthamurthi with him) for the appellant.

M. Shankar for the first respondent.

Sulaiman C. Navarednam for the second respondent.

Edgar Joseph Jr. for the third respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The criminal proceedings in the three cases under appeal revolved round the endeavours of Syarikat Almac Sendirian Berhad (Almac) to develop a housing estate on lands owned by it. In the course of the development, Almac submitted a lay-out plan, Plan No. 05612-A, for the proposed housing scheme. Later, it submitted building plans in two stages. The first, Plan No. 06187 A/E, was for 28 units of double-storey terrace houses, 8 units of semi-detached bungalows and 141 units of single-storey terrace houses. The second, Plan No. 17125 A/E, was for 16 units of two-storey shophouses.

The plans were passed, it being alleged by the prosecution by the corrupt practices of Datuk Tan Cheng Swee (Datuk Tan) as a public officer, and his offences were said to be abetted by three others. Consequently, a charge was laid against Datuk Tan in respect of the approval of the lay-out plan and two charges in respect of the approval of the building plans. He was charged in Malacca Criminal Trial No. 1 of 1977 as a public officer in his capacity as the Commissioner of the Malacca Municipality with corrupt practices in the approval of the plans. The charges are as follows:—

“First Charge

That you on 29th March, 1974, in the office of the Malacca Municipality, in the District of Melaka Tengah, in the State of Melaka, being a public officer, to wit, Commissioner of Malacca Municipality, committed corrupt practice in that you while being such public officer approved the layout plan for the proposed housing scheme at Lot Nos. 181, 182, 183, 187, 188, 544, 545, 546, 547, 548, Town Area 37 Jalan Ujong Pasir Malacca, vide plan No. 05612-A submitted by Syarikat Almac Sendirian Berhad on 4th May 1973, of which you were a share-holder and the Executive Chairman, and by that act you had used your public office for your pecuniary advantage, and that you have hereby committed an offence punishable under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

Second Charge

That you on 14th July, 1975, in the office of the Malacca Municipality, in the District of Melaka Tengah, in the State of Melaka, being a public officer, to wit, Commissioner of Malacca Municipality, committed corrupt practice in that you while being such public officer approved the building plan for the proposed 28 units of double storey terrace houses, 8 units of semi-detached bungalows and 141 units of single storey terrace houses, vide plan No. 06187 A/E submitted by Syarikat Almac Sendirian Berhad on 25th April, 1974 of which you were a share-holder and the Executive Chairman, and by that act you had used your public office for your pecuniary advantage, and that you have thereby committed an offence punishable under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

Third Charge

That you on 17th November, 1975, in the office of the Malacca Municipality, in the District of Melaka Tengah, in the State of Melaka, being a public officer, to wit, Commissioner of Malacca Municipality, committed corrupt practice in that you while being such public officer approved the building plan for the proposed 16 units of two storey shop-houses vide plan No. 07125 A/F submitted by Syarikat Almac Sendirian Berhad on 25th April, 1974, of which you were a shareholder and the Executive Chairman, and by that act you had used your public office for your pecuniary advantage, and that you have thereby committed an offence punishable under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.”

It is to be noted that the charges recited the fact, which is not disputed by the defence, that Datuk Tan was a shareholder and the executive chairman of Almac.

A In Malacca Criminal Trial No. 2 of 1977, Ng Chong Chee (Ng) was charged with abetting Datuk Tan in the first two offences. Later, Loh Kee Peng (Loh) and Lee Geok Teong (Lee) were charged with the same offences of abetment on all three charges. All three were not charged as public officers.

B The charges were laid under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970. The section reads:

“2(1). Any Member of the Administration or any Member of Parliament or the State Legislative Assembly or any public officer who while being such a Member or a public officer commits any corrupt practice shall be guilty of an offence and shall be liable upon conviction to imprisonment for a term not exceeding fourteen years or to a fine not exceeding twenty thousand dollars or to both imprisonment and fine.”

C The definitions of corrupt practice and public officers are to be found in sub-section (2).

“2(2). For the purposes of this section—

‘corrupt practice’ means any act done by any Member or officer referred to in sub-section (1) in his capacity as such Member or officer, whereby he has used his public position or office for his pecuniary or other advantage. . . .

D ‘public officer’ has the meaning assigned to it in section 2 of the Prevention of Corruption Act 1961.”

The meaning assigned to “public officers” in the Prevention of Corruption Act, 1961 is in these words:

“‘public officer’ includes any person in the permanent or temporary employment of a public body.”

E Briefly, on a proper interpretation of these statutory definitions, to sustain the charge of corrupt practice the prosecution must prove that the accused was acting as a public officer and that the act he committed accrued to his pecuniary or other advantage. A public officer is not restricted to any person in the permanent or temporary employment of a public body.

F All four accused were jointly tried in the High Court at Malacca. At the close of the case for the prosecution on December 27, 1977, after a trial extending over 16 days, the learned judge heard lengthy submissions of no case to meet from counsel for the accused and an equally replete reply from the prosecution. He then took time for consideration. On February 4, 1978, he delivered a judgment of some length in writing in favour of the defence submission. He held shortly that the prosecution had not established a *prima facie* case against all four accused and he ruled therefore that the defence had no case to meet.

G He had no difficulty in coming to the finding that Datuk Tan in approving the three sets of plans in his capacity as Commissioner of Malacca Municipality had used his public office for his pecuniary or other advantage. This finding involved *mens rea* on the part of Datuk Tan which in his view was present in the acts of approval of the plans of his own housing development. But he held that Datuk Tan was not a public officer and in the absence of this first essential ingredient of the offence, he found him not guilty of the charges.

H As for the learned judge’s reasons for dismissing the charges of abetment against the other three accused, it may make for greater clarity to deal with them after the question of whether Datuk Tan was or was not a public officer within the definition in the Prevention

of Corruption Act, 1961 has been disposed of. But perhaps it is to be observed now that the prosecution has preferred no appeal from the acquittal of Loh, possibly because Loh was only a shareholder of Almac and perhaps also an officer in Almac but he held no office in the Municipality and had no hand whatsoever in the passing of the plans. All he did was to sign the plans in question as an officer of Almac.

It is now necessary to delve into the history of the Malacca Municipality leading to the appointment of Datuk Tan as the sole Commissioner. The Municipality of Malacca was given a constitution by the Constitution of the Town and Fort of Malacca Order, 1960 with effect from April 1, 1961. It became an elected body, but its constitution was suspended on September 21, 1966 by an order known as the Constitution of the Town and Fort of Malacca (Suspension) Order, 1966 under Malacca P.U. 27 of 1961 and by an order known as the Malacca Municipal Council (Transfer of Functions) Order, 1966, all its functions, including those of the President, Deputy President and the Municipal Councillors were transferred to the Chief Minister, Malacca until such time as a decision was made by the State Authority on the report to be submitted by the Royal Commission of Enquiry investigating into the workings of Local Authorities. This order is Malacca P.U. 26 of 1966 published on September 21, 1966. On December 22, 1966, by Malacca P.U. 48 of 1966, Datuk Tan, Ng (the second respondent), E.V. Patel and Tuan Haji Ahmad bin Lapis were appointed by the State Authority of Malacca, to be members of the Advisory Committee for the Municipal Council of Malacca with effect from December 1, 1966. These appointments were made under the powers conferred by the aforesaid Malacca P.U. 26 of 1966 and by sub-section 3 of section 398 of the Municipal Ordinance (S.S. Cap. 133).

This set-up was in 1967 changed and Datuk Tan replaced the Chief Minister Malacca. By an Order in Malacca P.U. 30 of 1967 published on October 31, 1967, known as the Constitution of the Municipality of the Town and Fort of Malacca (Suspension) Order, 1967, the Constitution of the Malacca Municipality remained suspended and by the Malacca Municipal Council (Transfer of Functions) Order, 1967, published as Malacca P.U. 31 of 1967 on November 16, 1967, all the functions of the Malacca Municipal Council including the President, Deputy President and Councillors or any or all of them became transferred to Datuk Tan who was to be styled as the Commissioner by virtue of section 398(3)(i) of the Malacca (Amendment) (Malacca) Enactment, 1966. Malacca P.U. 26 and 27 of 1966 were then cancelled.

The intents and purposes of Malacca P.U.s. Nos. 30 and 31 of 1967 were therefore to suspend the Constitution of the Municipality of Malacca and to transfer all the functions of the Municipality into the hands of an individual. It was perhaps thought necessary that before the second objective could take effect, the first would have to be achieved. Now section 5(3) of the Local Government Elections Act, 1960 under which Malacca P.U. 27 of 1966 and 30 of 1967 suspending the Constitution of the Municipality of Malacca were made, reads as follows:

A "5(3). The State Authority may at any time amend, modify or repeal any order made under this section."

It occurs in Part III of the Act which relates to Town Boards and Rural Councils and it can have no relevance to Municipal Councils. Insofar as Municipal Councils are concerned, they can be amended, modified or repealed only by an act of the State Legislative Council, under section 4(6) which is in these words:

B "4(6). Subject to the provisions of Article 76 of the Constitution, no Constitution in operation under this Act shall be amended, modified or repealed otherwise than by a law passed by the Legislature of a State."

So far as we can advise ourselves, it does not appear that Malacca P.U. 30 of 1967 was validly made, but as we shall see, this does not seem to have any effect on the issue before us.

C Malacca P.U. 31 of 1967 is expressed to be made by order under the provisions of section 398(3)(i). Section 398(3) was introduced as an amendment of the Municipal Ordinance on July 23, 1966 by the Municipal (Amendment) (Malacca) Enactment No. 7 of 1966 passed in the Legislative Assembly of Malacca on July 14, 1966. It is in these words:

D "398(3). (i) The State Authority may if it appears to it necessary or desirable in the public interest so to do notwithstanding any other provisions of this Ordinance, by order transfer all or any of the functions of the Council or any employee thereof to the Chief Minister or to such other person or authority as he may prescribe; and if the State Authority is of the opinion that an investigation should thereafter be held may cause an enquiry to be held into any matter and may make such further order as it may think fit.

E (ii) Where under the provisions of paragraph (i) of this subsection the State Authority has transferred to the Chief Minister or such other person or authority aforesaid of all or any of such functions of a Council or any employee thereof —

(a) the expenses incurred by the Chief Minister or such person or authority in discharging such functions as aforesaid shall be paid from the Municipal Fund;

F (b) the payment of such expenses as aforesaid shall, to such extent as may be sanctioned by the State Authority, be deemed to be a purpose for which the Council may borrow in accordance with the provisions of this Ordinance and the provisions of Part XV of this Ordinance shall be construed accordingly."

G The Order Malacca P.U. 31 of 1967 was therefore an order by delegated authority of the State Legislative Assembly to the State Authority and was in conformity with the proviso to section 3(1) Local Government Elections Act, 1960 which reads:

H "Provided that nothing in this sub-section shall prevent the Legislature of a State to provide in the Municipal Ordinance for the transfer of any of the functions of the Council relating to the Municipal affairs of the Municipality to any person, officer or authority for such period as the State Authority may deem necessary or desirable in the public interest."

I so that whatever might be the position of the Constitution, the powers and functions of the Municipal Council including those of the President, Deputy President and Councillors had been validly transferred to Datuk Tan.

Then, on May 13, 1971, the State Authority of Malacca made an order known as Malacca Municipal Council (Transfer of Functions) Order No. 1 of 1971 with effect from February 1, 1971, (Malacca P.U. 10 of 1971) whereby it was provided

"2.(i) For the purpose of discharging his functions pursuant to the Malacca Municipal (Transfer of Functions) Order 1971, Dato Tan Cheng Swee shall be assisted by a Committee consisting (of) 3 members to be appointed by the State Authority.

(ii) Dato Tan Cheng Swee shall be the chairman of the committee, ...

5. (i) The members of the Committee shall be paid allowances as follows:

(a) The Chairman, an allowance of \$500 per month.

(b) The other members, an allowance of \$300 per month each....

6. The Chairman shall preside at all meetings of the Committee....

8. The Committee may, if it deems expedient so to appoint any member of sub-committees for the purpose of transacting certain business or performing such functions as the Committee may by resolution direct or delegate either specially in any particular subject matter or generally in all matters pertaining to such business or functions.

Provided that the persons to be appointed as members of such sub-committees shall be selected only from amongst the members of the committee."

Following this, the three members of the Committee appointed by the State Authority to assist Datuk Tan were announced in Malacca P.U. 11 of 1971 to be Ng Chong Chee (Respondent No. 2 in this appeal) N.V. Patil and Tuan Haji Rahmat Shah bin Ali Shah Khan. For the numerous sub-committees necessary to be established for the efficient running of the Malacca Municipality there does not seem to be many to choose from, but there is no statutory requirement of any quorum for any of such sub-committees. The complexity of municipal administration must have been heavy enough as to influence the State Authority with effect from March 1, 1975 to enlarge the Committee to 8, by the inclusion of 3 ex-officio members of the State Government and the introduction of two other members of the public: Malacca P.U. 5 of 1975 dated March 13, 1975.

It is to be borne in mind that only Datuk Tan and the appointees to the Committee could be appointed to any sub-committee of the Municipality.

The argument that Datuk Tan was a public body and not a public officer with which the learned judge agreed was based partly on the contention that the definition of a public body in the Prevention of Corruption Act, 1961 includes "commissioners", and by extension commissioner where he is the only appointee. It was also contended that the word "meaning" in the definition of public officer in the Emergency (Essential Powers) Ordinance No. 22 of 1971 is entirely restrictive and it was not permitted to any court to go beyond it. It was therefore said to be necessary that there should be some employment, some relationship of master and servant or of principal and agent.

We agree that when a statute says that a word or a phrase shall mean certain things, the definition is a hard and fast definition and no other meaning can be assigned to the expression that has to be done in the definition, *per* Lord Esher M.R. in *Gough v. Gough*,⁽⁵⁾ and in *Bristol Trams Co. v. Bristol*.⁽⁶⁾ But with respect, we consider that having regard to the fact that the word "meaning" in Ordinance No. 22 refers to the definition in the Prevention of Corruption Act, 1961, the definition is not limited to any person in the permanent or temporary employment of a public body. It includes but is not restricted to such a person. How far the net is spread we shall soon consider, but perhaps it will not be out of place here to consider the rule of commonsense meaning of the words in a statute, even a penal statute.

James L.J. in *Dyke v. Elloitt, The Gauntlet*⁽⁷⁾ at page 191 in delivering the judgment of their Lordships of the Privy Council observed:

"No doubt all penal statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

The Supreme Court of India has in *M. Narayanan Nambiar v. State of Kerala*⁽⁸⁾ at p. 1118 described this view as the correct perspective and with respect, we would adopt this approach in the interpretation of a statute and apply it to cover the determination of the question whether Datuk Tan was or was not a public body.

But before coming to this determination and in truth, as a part of the exercise, we consider that the use of the plural "commissioners" in the definition of public body in the Prevention of Corruption Act, 1961 is of significance and points to the correct interpretation. We are of the opinion, on a proper interpretation, that "commissioners" in the context of this definition mean the commissioners collectively as a body, and that as a body and in a collective sense they constitute a public body but the commissioners individually do not.

We are, of course, not unmindful of the argument of learned counsel for Datuk Tan that he, Datuk Tan, was constituted the sole commissioner. There was no other commissioner. But it was never contended or argued that he was a corporation sole, and if he was not, then the answer to counsel's argument must lie where it should, of course, lie, in the several *Gazette* notifications setting Datuk Tan as the Commissioner of Malacca. Malacca P.U. 31 of 1967 merely transfers all the functions of the Malacca Municipal Council, including the President, Deputy President and the Municipal Councillors to Datuk Tan who "shall be styled as the Commissioner" by virtue of section 398(3)(i) Municipal Ordinance. On a strict and proper interpretation of Malacca P.U. 31 of 1967, we are of the opinion that Datuk Tan was not a public body but a public officer who was given the power to exercise the functions of the Municipal Council and the members, collectively and individually thereof. The styling as the sole Commissioner for Malacca did not have the effect of making Datuk Tan a public body or a corporation sole. Section 398(3)(i), *supra*, under which the order is made does not have the effect which his counsel contended.

The learned trial judge agreed that Datuk Tan "would appear" to be a public officer as he was "apparently" performing the functions of a public office (*sic*) (we believe he meant public officer) as the Commissioner of the Malacca Municipality but he thought it was true only in a general sense and, to

quote, "whatever is apparent may not always be real in a legal sense."

This is the view of Alice through the Looking Glass, and with respect, and in our judgment, the wrong view to take in the hard world of fact and law. We should have thought that the right approach to the case or any case for that matter is to determine the facts on the evidence adduced and then to apply the law on the subject, in the letter and spirit of that law. It was therefore not a question of whether Datuk Tan "apparently" exercised the functions of a public officer. The question was and is whether he did do so. The answer to this question bears on the determination whether or not, he was a public officer.

Apparently, however, the learned judge thought that though Datuk Tan "may well be a public officer under the common law and he certainly is a public servant within the 10th description under section 21 of the Penal Code," he could only be a public officer if he was in the permanent or temporary employment of the Malacca Municipal Council. To him, the payment of an allowance was immaterial. Datuk Tan was according to Malacca P.U. 31 of 1967 himself the Council and not its employee.

With great respect, we are of the opinion that to hold that Malacca P.U. 31 of 1967 constituted Datuk Tan the Council was to misread the words "all the functions . . . shall be transferred to" and to ignore the short title of the notification which reads Transfer of Functions. The said Order transferred the functions to an individual. It did not constitute that individual the Council. That Council remained in existence. If Malacca P.U. 30 of 1967 was validly made, its constitution was suspended for the time being but during the time of this suspension, it functioned through a particular named person. Confirmation that this literal meaning of the relevant Orders is the correct view may be found in the proviso to section 4(5) of the Local Government Elections Act No. 11 of 1960 in Part II under the Chapter heading of Constitutions of Municipalities. The proviso which was passed by Act No. 67 of 1966 on September 17, 1966 but given retrospective effect from January 26, 1966 reads:

"Provided that where the State Authority pursuant to any power in the Municipal Ordinance transfers any of the functions of the Council relating to the Municipal affairs of a municipality to any person, officer or authority the Constitution aforesaid (or so much of the provisions thereof as may be specified in the Order effecting such transfer) shall during the period of the transfer be deemed to be suspended and shall cease to have the force of law and shall cease to have effect."

It is therefore possible to transfer to and concentrate all the functions of the Council in "any person, officer or authority" and in the case of Datuk Tan, he was the person or officer to whom the transfer had been made. But this transfer did not make him, the grantee of the powers, the employer or the grantor. His character as a Councillor remained with this difference: whereas if he was a Councillor previous to the suspension of the Constitution of the Municipal Council he shared the powers and responsibility of the administration with other Councillors, he now exercised the powers and bore the responsibility for such administration himself, with perhaps a little relief from his advisory committee.

A The Municipal Ordinance (S.S. Laws Cap. 133) has never been repealed. By section 398(1) thereof, Councillors are deemed to be public servants within the meaning of the Penal Code. Thus in *Public Prosecutor v. Phee Joo Teik*,⁽¹⁾ a Town Councillor was held to be a public servant, being caught by the "deeming" section 398. The learned judge who referred to the case of *Phee Joo Teik* was with respect right when he held that Datuk Tan was a public servant under the Penal Code. He held however that the definitions in Ordinance No. 22 of 1970 and in the Prevention of Corruption Act, 1961 were not deeming provisions and so Datuk Tan could not be brought by section 398 within the definition of public servant. But with great respect, it seems to us that he had erred in failing to direct his mind to the use of the word "include" in section 2 of the Prevention of Corruption Act, 1961 and to apply the principle that the greater could and should include the less.

C A public officer for the purposes of the Ordinance No. 22 of 1970 is by reason of the use of the word "includes" in contradistinction to the narrower term "means", not restricted to the class of persons in the temporary or permanent employment of a public body. We shall not attempt, even if we are capable of it, an exhaustive definition of a public officer, where the Legislature has failed to provide.

E Lord Mansfield in *R. v. Samuel Vaughan*⁽⁹⁾ held that the office of the First Lord of the Treasury was granted by Letters Patent under the Great Seal of England and therefore must be governed by the laws of England.

In *Henley v. The Major and Burgesses of Lyme*,⁽²⁾ Best C.J. had to decide on what constituted a public officer. In his opinion

F "everyone who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer."

G In *Whitaker*,⁽³⁾ the Court of Criminal Appeal of England held that a colonel in command of a regiment of His Majesty's Army is a public officer and guilty of the common law misdemeanour of accepting as a public officer a bribe from a firm of caterers as an inducement to accept their representatives as tenant of the regimental canteen. *Per* Lawrence J., in delivering the judgment of the Court at p. 1296:

H "A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharged, he is a public officer."

We accept that a public officer in the context of the relevant ordinance is an officer who discharges any duty in the discharge of which the public are interested, more so if he is paid from public funds.

I To return to Datuk Tan, there can be no doubt that he was appointed to discharge a public duty, and that in the discharge of that duty the public are (and as the prosecution said by charging him, he as a member of that public is) interested. He might be receiving only a paltry allowance of \$500 a month, but this while inadequate or wholly inappropriate, was nevertheless compensation in some shape, and it came from public funds. Other compensation might be in

the form of the prestige and social and protocol standing that goes with the appointment.

We therefore hold that Datuk Tan is a public officer within the definition of public officer in the Prevention of Corruption Act, 1961 and for the purposes of a charge of corrupt practice under the Emergency (Essential Powers) Ordinance No. 22 of 1970.

We consider that our view accords with sound commonsense. The Emergency (Essential Powers) Ordinance No. 22 of 1970 is enacted to widen the campaign against bribery and corruption and now makes a penal offence any practice that comes within the definition of corrupt practice in the Ordinance, which previously would have escaped the net of the Penal Code and the Prevention of Corruption Act. To say that an individual member of a Municipal Council may be found guilty of a corrupt practice as a public officer but another individual in whom all the collective and particular powers of the Councillors have been concentrated by statutory transfer may not because though he uses these powers, he is not a public officer but the Council itself would be, in our view, to find a doubt or ambiguity where none exists or to rely on a *hiatus* in the law where there is none and would reduce the law to an absurdity. One has only to carry the respondent's arguments a little further to come to the startling conclusion that Datuk Tan in the affairs of the Municipal Council could never be charged with and convicted on an offence of bribery or corruption as an agent in the affairs of his principal.

For these reasons, we do not find it necessary to refer to the fairly large number of cases we have been taken through so diligently by counsel which deal with bribery and corruption of agents or servants in relation to the affairs of their principals or masters.

Our interpretation of the law, on the finding of the learned judge of corrupt practices on the part of Datuk Tan, even though he thought them merely technical offences, necessarily means that the case at least of Datuk Tan must be remitted to the High Court for the defence to be called, unless, of course, it could be shown that the learned judge's finding of corrupt practice was wrong. For this there was no necessity for any cross-appeal by the respondents. The appeal by the Public Prosecutor being by way of re-hearing, it was open to the respondents to say that on the evidence for the prosecution no *prima facie* case on this second ingredient of the offences had been established which un rebutted would have resulted in a conviction. This involved the element of *mens rea*.

The learned judge had held that *mens rea* was a necessary ingredient of the offence and that in what they had done, Datuk Tan and Ng had the necessary intention, the former in the corrupt practices with which he was charged and the latter in abetting him, when they approved the plans of Almac in Committee. Counsel for Datuk Tan and Ng did take the course of submitting to the court the absence of *mens rea* and they took us through a lengthy consideration of the law and a review of the case on the evidence in order to persuade us that in the event of our finding Datuk Tan a public officer, we should still not remit the case to the court of first instance to call on the defence.

A This was said to be because the learned judge was wrong in holding that both Datuk Tan and Ng had any criminal intention when they passed the plans.

B Now, Ng was a member of the Building Sub-Committee which passed the plans. He was also a director and shareholder of Almac. He was present at the relevant meetings of that Sub-Committee. The point that he was not a public officer was not taken. Datuk Tan as chairman of the Sub-Committee was said not to have been present at any meeting at which the plans of Almac were considered, but he was the final approving authority.

C We do not think that it will be right for us at this stage and it would certainly place an intolerable burden on the trial judge if we do so, to comment further on the evidence in view of the order we propose to make, but giving the lengthy submission of counsel for the respondents the fullest consideration it deserves, we are of the opinion nevertheless that on the whole of the prosecution evidence, a *prima facie* case has been established against Datuk Tan and Ng which un rebutted would warrant their conviction. We therefore allow the appeal of the Public Prosecutor against the acquittal and discharge of Datuk Tan and Ng and remit the case to the High Court at Malacca with the direction that the defence be called. It goes without saying that if the defence can satisfy the trial court on a balance of probabilities that the guilty element was absent, then the accused would be entitled to an acquittal.

F We now turn to the third respondent. He was not an official member of the Building Sub-Committee, but only a paid employee of the Municipal Council, being the Municipal Engineer. In such office, he attended the meetings of the Building Sub-Committee in an advisory capacity. His duties are laid down in section 144 of the Municipal Ordinance. It reads "144(1). Every person intending to erect any building shall submit to the Commissioners plans and specifications of the proposed building prepared in accordance with this Ordinance and the building by-laws. When such plans and specifications are certified by the Municipal Architect or Municipal Engineer to be in accordance with this Ordinance and the Building by-laws, they may be approved by the President on behalf of the Commissioners;"

G His duty was therefore to process the plans and specifications of the building proposed to be constructed, ascertain that they were in conformity with the Ordinance and the building by-laws and to certify accordingly. Presumably if they do not conform, he would have to say so. However neither the provisions of the Ordinance nor the building by-laws are absolute in character. They allow a certain variation, and by a statutory amendment, the Commissioners are given the discretion to consider and approve any waiver or modification of the requirements with regard to any particular building or structure. This discretion is contained in section 144A, Municipal Ordinance:

H "144A(1). The Commissioners may on receipt of an application in relation to any particular building or structure, or part of a building or structure, and provided that they are satisfied that such waiver or modification as hereinafter mentioned will not render the building or structure unsafe, modify or waive, upon and subject to such terms and conditions as they think fit, any of the requirements of any of the building by-laws."

I

But before exercising this discretion in any application for waiver or modification which must be in writing, the Commissioners would have to be satisfied that such application would not render the building or structure unsafe. It would therefore be the duty of the Municipal Engineer to advise whether this would be so and again presumably he would not advise approval unless he was satisfied that it was so. But the discretion vests in the Commissioners, in the circumstances of this case in Datuk Tan acting on the advice of the Building Sub-Committee and the decision is at all times his. The Building Sub-Committee could reject or accept. But the duty of the third respondent is advisory only in such matters: see Malacca Municipal Administrative Duties of Standing Committees and Executive Officers By Laws 1949, in particular by-laws 15 and 17.

But before the stage of considering building plans is reached, the land in a housing estate would have to be divided into sub-lots, or at least, a lay-out plan for such sub-division had been approved. Accordingly, Almac's predecessor was advised on April 1, 1974 that the building plans would only be considered after the sub-division plans had been approved by the State Authority. On May 6, 1975, the third respondent wrote to Almac's architects, *inter alia*, that

"23. A 30% reservation of the housing scheme has to be provided for bumiputras or the sub-division has to be approved by the state authority prior to the building plan being considered."

Now it is obvious that the provision of a certain quota for bumiputras as the result of the economic policy evolved by Government was a quite different matter from the question of sub-division and the latter could not be a substitute for the former. The clear intention would be indicated by the replacement of the disjunctive "or" with the conjunctive "and", and it would appear that "or" was nothing more than a typing error or an error of composition. But it was contended by the prosecution that it was a deliberate choice of words enabling Almac to proceed with their building plans before sub-division. It was a fact which the defence could not deny that the building plans were, contrary to the letter of April 1, 1974, submitted for consideration and considered before the approval of the lay-out plan or sub-division was obtained from the State Authority. But the contention of the prosecution would be an inevitable conclusion if and only if, in a criminal trial as this was, Almac was induced to act and had indeed acted on the basis that bumiputra reservation was a substitute for sub-division. However such was not the case. Almac knew clearly and was never induced to think otherwise, that sub-division must be obtained independent of the quota to be reserved. That this was so could be seen in the reply of their architects to the third respondent's letter of May 6, wherein they advised that:

"23. The developers agree to a 30% reservation of the housing scheme for the bumiputra and sub-division has already been approved by the State Authority."

Clearly the use of the perfect tense "has been approved" shows that the conjunctive "and" was correctly used in the context. Almac never thought that there was an alternative to sub-division.

A Now the information contained in the second part of this sentence is, without doubt, false and it was given by Almac's architects. The third respondent acted on it and went on to process the building plans. He was perhaps remiss in his duty in not ascertaining from the relevant authorities whether sub-division had in fact been approved before acting on the building plans, but in the absence of any circumstances arousing his suspicion, he was perhaps entitled to rely on the word of Almac's architects.

B On the matter of the building plans, it would perhaps be sufficient to summarise the case of the prosecution thus: the relaxations in by-laws with respect to open-space provisions, access roads, *cul-de-sac*, air-wells (described as open-area) in the buildings and other matters established the offence of abetment against the third respondent. We have scrutinised the evidence and read the various files and the minutes therein. In most matters, the relaxations sought by Almac were within the acceptable limits imposed by the by-laws. In these and the others, the third respondent had in every instance sought the opinion of other technical persons whose views had a bearing on them and with their concurrences, he had in each case put up the application for waiver or modification, as the case might be, to the Building Sub-Committee with the notification that the matter was for approval subject to the application being brought up for discussion. He had therefore at every instance directed the attention of the Building Sub-Committee that their approval was to be given only if they were prepared to exercise their discretion to relax the relevant by-law. And in the absence of any contention by the prosecution that the waivers or modifications sought were not within the acceptable minimum limits imposed or they rendered the buildings unsafe, as in section 144A Municipal Ordinance, he had consequently only discharged his duty in accordance with the requirements of law.

C But it was also said that he did all this (and all the civil servants who had anything to do with Almac's housing scheme as well but who were not charged) with criminal intention because he knew of Datuk Tan's connections with Almac. We do not consider that the prosecution had adduced evidence beyond reasonable doubt of the third respondent's knowledge of this. We do not think that a case should be tried on suspicion but even if it were so, we do not consider that this knowledge, in the absence of any other evidence, leads inevitably to the guilt of abetment. Even if he knew, he must leave it to Datuk Tan and Ng to decide whether they would proceed but he had the duty to process the plans and we do not with respect consider that this alleged knowledge in the circumstances in this case would make the execution of his duty criminal.

D We therefore uphold the acquittal and discharge of the third respondent.

E *Order accordingly.*

F Solicitors: *Shearn, Delamore & Co.; Sulaiman C. Navarednam & Co.; Joseph & Son.*